No. 09-740

In the Supreme Court of the United States

ANTOINE HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's statement that he kept a gun in his apartment, given in response to police questioning before he received *Miranda* warnings, was admissible under the public-safety exception to the *Miranda* rule.

2. Whether petitioner's statements about his drug-trafficking and gun possession, given after receiving *Miranda* warnings, were admissible notwithstanding that the police had earlier obtained from him unwarned statements that a gun and drugs could be found in his apartment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is available at 340 Fed. Appx. 950.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2009. On November 4, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to December 21, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing heroin with intent to distrib-

ute, in violation of 21 U.S.C. 841; possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); and being a felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. C.A. App. 286-287. The court of appeals affirmed. Pet. App. 1a-7a.

1. On August 10, 2007, police officers in Richmond, Virginia, received information from confidential sources that petitioner was a drug dealer and that he kept drugs and a gun at his apartment. Gov't C.A. Br. 4-5; Pet. App. 10a. The ensuing police investigation indicated that petitioner leased the apartment with another individual. C.A. App. 152-153. After receiving the information about petitioner, the officers obtained a search warrant for the apartment. Gov't C.A. Br. 5.

Before executing the search warrant, the officers conducted surveillance of the apartment building. Gov't C.A. Br. 5. During the surveillance, they observed petitioner leave the building and drive away. Pet. App. 10a. They stopped his vehicle, informed him of the search warrant, and transported him to the Special Investigation Division office. *Ibid.* During the trip to the office, without reading petitioner the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Detective Todd Bevington asked petitioner three questions about his apartment—whether anyone was inside the apartment, whether there were any guns in the apartment, and whether there were any drugs in the apartment. Gov't C.A. Br. 5. Petitioner responded that nobody was in the apartment; that there was a gun in the bedroom; and that there was heroin in the living room. *Ibid.* Detective Bevington did not ask any follow-up questions. *Ibid.* After delivering petitioner to the office, Detective

Bevington returned to the apartment to assist in the execution of the search warrant. The search uncovered 56 grams of heroin, a semiautomatic pistol, drug paraphernalia, $6900 in United States currency, and other evidence. Pet. App. 10a-11a.

Following the execution of the search warrant, Detective James Killingsworth approached petitioner about speaking to him. Pet. App. 11a. Detective Killingsworth first read petitioner his *Miranda* rights, and then asked him if he understood them. Gov't C.A. Br. 6. Petitioner did. *Ibid.* Petitioner then told Detective Killingsworth, among other things, that he had possessed the firearm for two years and kept it for protection; that he had purchased the heroin found in his apartment for $5000; that he had purchased two ounces of heroin from the same source on one other occasion; that he dealt heroin to pay his bills; and that he had engaged in numerous purchases of drugs for further sale. *Id.* at 7-8.

2. Petitioner was indicted for possessing heroin with the intent to distribute it, in violation of 21 U.S.C. 841; possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c); and being a felon in possession of ammunition, in violation of 21 U.S.C. 922(g)(1). C.A. App. 8-10.

Before trial, petitioner moved to suppress the statements he made to law enforcement officers both before and after he received his *Miranda* warnings. The district court denied the motion. Pet. App. 9a-13a. It held that petitioner's initial statements to Detective Bevington were admissible, notwithstanding Bevington's failure to read petitioner his *Miranda* warnings, under the public-safety exception to *Miranda*. See *New York* v. *Quarles*, 467 U.S. 649 (1984). The officers had reason to believe, the court held, that weapons and other individu-

als at petitioner's apartment could pose a danger to officers in executing the warrant. Pet. App. 11a. The court admitted petitioner's post-warning statements because they were preceded by *Miranda* warnings. *Id.* at 12a.

Petitioner was subsequently tried and convicted on all counts of the indictment. C.A. App. 259. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. *Id.* at 286-287.

3. The court of appeals affirmed in an unpublished per curiam opinion. The court first rejected petitioner's contention that the district court erred in admitting petitioner's unwarned statement that there was a gun in his apartment. Pet. App. 3a-4a. Citing *Quarles*, *supra*, the court explained that Detective Bevington's inquiry fell within the public-safety exception to *Miranda*, because the "[p]olice were aware that [petitioner] did not reside in the apartment alone, and had reason to suspect that weapons were located in the residence." Pet. App. 3a. The court added that "at the time [petitioner] was questioned, the residence had not yet been secured." *Ibid.*

The court next held that petitioner's unwarned statement that there were drugs in the apartment was obtained in violation of *Miranda*, because the possibility that the residence contained drugs did not implicate the public-safety exception. Pet. App. 4a. Nevertheless, the court concluded that the error in admitting the statement was harmless beyond a reasonable doubt. *Id.* at 4a-5a. The court explained that "[b]ecause the district court correctly admitted [petitioner's] post-*Miranda* statements—which were essentially identical to his pre-*Miranda* statements— * * * the jury 'would not have found the [government's] case significantly less persuasive' if the pre-*Miranda* statements had been exclud-

ed."[1] *Id.* at 4a-5a (footnote omitted; brackets in original) (quoting *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972)).

Finally, the court of appeals rejected petitioner's argument that his pre-warning statements tainted his post-warning admissions and rendered them inadmissible. Pet. App. 4a n.3. The court concluded that there was no evidence that the police had deliberately failed to give the *Miranda* warnings until after petitioner's initial statements, that the police had employed "deliberately coercive or improper tactics in obtaining the initial statement," or that the post-warning statements were involuntarily made. *Ibid.* (quoting *Oregon* v. *Elstad*, 470 U.S. 298, 314 (1985), and *United States* v. *Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005)).

ARGUMENT

1. Petitioner first contends (Pet. 7-18) that the court of appeals erred in holding that petitioner's pre-warning statement that there was a gun in his apartment was admissible pursuant to the public-safety exception to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The presence of a gun in the apartment, petitioner argues, posed no immediate danger to the police officers or the public and, therefore, petitioner's statement should have been suppressed. The court's decision was correct, and it does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted.

a. In *New York* v. *Quarles*, 467 U.S. 649 (1984), this Court recognized a public-safety exception to the requirement that police provide a suspect with *Miranda* warnings before statements taken in custodial interrogation may be admitted into evidence. In *Quarles*, officers chased a rape suspect through a supermarket and

[1] Petitioner does not challenge this holding here. Pet. i.

arrested him there. *Id.* at 651-652. The officers had learned that the suspect was armed, and, upon frisking him, discovered an empty shoulder holster. After handcuffing the suspect, one of the officers asked him where the gun was, to which the suspect responded, "the gun is over there." *Id.* at 652. The Court held that, although the suspect had not received *Miranda* warnings, his statement was nevertheless admissible because it was elicited by questioning that was "reasonably prompted by a concern for the public safety" or the safety of the police. *Id.* at 656, 658-659; *id.* at 659 n.8 (distinguishing between questions that are "clearly investigatory" and those that "relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon").

Petitioner argues (Pet. 15-18) that *Quarles* requires a showing of exigent circumstances creating an emergent threat to the public or police and that the court of appeals erred in applying the public-safety exception because the police had no immediate need to ascertain whether petitioner's apartment contained a firearm. Petitioner's contention (Pet. 15-16) that *Quarles* requires an immediate safety emergency is refuted by the facts of *Quarles* itself. There, the defendant was handcuffed and in the custody of armed officers when police queried him about a weapon. See 467 U.S. at 655. As the dissent noted, the police had no evidence that the defendant had an accomplice, the supermarket was "apparently deserted" during the late-night arrest, and the "police could easily have cordoned off the store and searched for the missing gun." *Id.* at 674-676 (Marshall, J., dissenting); see *United States* v. *Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (a "pressing need for haste is not essential"). Thus, the public-safety exception ap-

plies even in the absence of an exigent safety threat, so long as the police "ask questions reasonably prompted by a concern for the public safety."[2] *Quarles*, 467 U.S. at 656.

In holding that the questioning about the gun was permissible under the circumstances, the court of appeals correctly relied on the existence of reasonable safety concerns confronting the officers who were about to search petitioner's residence. Pet. App. 3a-4a. As the court observed, at the time that Detective Bevington asked petitioner about a gun, the police had not yet secured the apartment. *Id.* at 3a. In addition, the court noted, the police were aware that two people lived in petitioner's apartment and, therefore, it was possible that another person inside the apartment could gain access to any gun present inside and threaten the safety of the police. *Id.* at 3a-4a; C.A. App. 40 (officer testimony that he was concerned about "potential threat[s]" from unaccounted-for weapons and people in the apartment).

Petitioner's primary argument to the contrary (Pet. 16-17) is that petitioner told Detective Bevington, in answer to Detective Bevington's first question, that no

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[2] Petitioner contends (Pet. 16) that *Orozco* v. *Texas*, 394 U.S. 324 (1969), indicates that an immediate safety threat is required. That argument is misplaced. In *Orozco*, police officers arrested and then interrogated a suspect at length about his involvement in a murder, in the process asking him whether he owned a gun, and if so, where it was located. *Id.* at 325. This Court suppressed the defendant's statements because the defendant had not been given *Miranda* warnings before the interrogation. *Id.* at 326-327. As the Court noted in *Quarles*, the line of questions in *Orozco* was "clearly investigatory" and indistinguishable from the questions police would ask "to solve a serious crime." *Quarles*, 467 U.S. at 659 n.8. In *Quarles* itself, in contrast, the questioning was directed at neutralizing a potential danger to the public or the police.

other person was present in the apartment. But Detective Bevington was not required, at the risk of jeopardizing the safety of the officers who were going to secure the premises, to accept petitioner's assertion as true. The court of appeals therefore correctly held that *Quarles* permitted the police officer's question about the presence of a gun in the apartment. Petitioner's argument to the contrary is, at bottom, a challenge to the court's application of the legal standard to the facts of the case, and such a fact-bound claim does not merit this Court's review.

b. Petitioner contends (Pet. 8-15) that the court of appeals' decision conflicts with the decisions of other courts of appeals, district courts, and state courts, which, he asserts, have required a showing of exigent danger to the police or the public in applying the public-safety exception. Petitioner is incorrect. The decisions on which petitioner relies simply applied the inherently fact-specific *Quarles* standard by asking whether there was a reasonable need to protect the police or the public from an undiscovered weapon in light of the facts presented in each case.

In the federal appellate cases that petitioner cites (Pet. 8-14), the courts declined to apply the public-safety exception when the police had already eliminated any reasonable possibility that someone other than themselves could gain access to an unrecovered weapon by the time they questioned the defendant. See *United States* v. *Brathwaite*, 458 F.3d 376, 383 n.8 (5th Cir. 2006) (holding that public-safety exception did not apply because the police had already performed two sweeps of the defendant's house, knew that no one else was present, and had handcuffed its two occupants when they asked the defendant if there were any guns in the

house); *United States* v. *Raborn*, 872 F.2d 589, 595 (5th Cir. 1989) (stating in dicta that exception might not apply because the police had already arrested the defendant and secured and searched his truck when they asked him if there was a gun in the truck); *United States* v. *Williams*, 483 F.3d 425, 429-430 (6th Cir. 2007) (remanding to determine whether police could reasonably have believed "that someone other than police could access the weapon and inflict harm with it"); *United States* v. *Melvin*, No. 05-4997, 2007 WL 2046735, at *8, *11 (4th Cir. July 13, 2007) (holding that exception did not apply because questioning about a weapon in the defendant's truck occurred after the defendant had been arrested and the truck impounded), cert. denied, 552 U.S. 1032 (2007), and 128 S. Ct. 950 (2008); *United States* v. *Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (holding that exception did not apply because questioning occurred after police had arrested the defendant, determined that he was unarmed, swept the apartment, and determined that only the defendant was present), cert. denied, 514 U.S. 1129 (1995). These cases did not, as petitioner suggests, hold that immediate danger is necessary under *Quarles*; rather, they simply refused to apply the public-safety exception to questioning that occurred after the police had entirely neutralized the situation.

Conversely, courts of appeals have applied the public-safety exception to permit questioning when the police had not yet eliminated a reasonable possibility that an undiscovered weapon could pose a danger to police or the public. See *United States* v. *Liddell*, 517 F.3d 1007, 1008-1009 (8th Cir.) (officers conducting a late-night search of the defendant's vehicle had reasonable concern, after discovering one weapon hidden in the vehicle, about being harmed by mishandling other con-

cealed loaded weapons in the vehicle), cert. denied, 129 S. Ct. 627 (2008); *United States* v. *Fox*, 393 F.3d 52, 60 (1st Cir. 2004) (officer who found live ammunition during search of a suspect reasonably asked about the location of the gun accompanying the ammunition and how to unload the gun when officer was unable to do it himself), vacated on other grounds, 545 U.S. 1125 (2005); *United States* v. *Phillips*, 94 Fed. Appx. 796, 800-801 (10th Cir. 2004) (applying exception where police were about to search house of a drug dealer, and there may have been people and weapons inside), vacated on other grounds, 543 U.S. 1101 (2005).

Petitioner also cites (Pet. 10) federal district court cases that assertedly conflict with the decision below. District court decisions, however, are not precedential and do not establish conflicts warranting this Court's review. See Sup. Ct. R. 10(a). In any event, these cases are also consistent with the decision below. In *United States* v. *Salahuddin*, 607 F. Supp. 2d 930, 943-944 (E.D. Wis.), vacated *sub nom. In re United States*, 572 F.3d 301 (7th Cir. 2009), the court declined to apply the public-safety exception because the defendant was alone and handcuffed in his apartment when the police asked him about the presence of weapons, and the police had no reason to believe that any other person was in the apartment. And in *United States* v. *Rodriguez*, 931 F. Supp. 907, 911 (D. Mass. 1996), the court found the exception to be inapplicable because, by the time the police asked about weapons, the defendant had been removed from his apartment and the apartment had been "thoroughly secured."

Finally, the intermediate state appellate decisions on which petitioner relies (Pet. 10-11) similarly reaffirm that, in order for the public-safety exception to apply,

officers must have reasonable safety concerns arising from the possible presence of a weapon. See *State* v. *Strozier*, 876 N.E.2d 1304, 1311-1312 (Ohio Ct. App. 2007); *State* v. *Stephenson*, 796 A.2d 274, 280-281 (N.J. Super. Ct. App. Div. 2002) (exception may apply where gun is in unknown location in private apartment and may be accessible to third persons); *State* v. *Hendrickson*, 584 N.W.2d 774, 777-778 (Minn. Ct. App. 1998) (exception did not apply when individual suspected of stealing a gun was apprehended on the street and had no weapons on his person, and officers had no reason to believe that a gun defendant had stolen was accessible to third parties); *In re John C.*, 519 N.Y.S.2d 223, 227-228 (App. Div. 1987) (exception did not apply when officers had already secured apartment and first questioned defendant about his guilt).

In sum, the court of appeals' reliance on a reasonable need to protect against danger to the police or public on the facts of this case does not conflict with the decisions on which petitioner relies. Those courts applied the *Quarles* standard to the specific factual circumstances presented in each case, and the varying outcomes create no conflict meriting this Court's review.

c. Even if this Court wished to review the lower courts' application of *Quarles*, this case would not be an appropriate vehicle in which to do so because the application of the public-safety exception would have no impact on the ultimate outcome. As discussed pp. 16-19, *infra*, petitioner's more detailed post-warning statements admitting that he owned the gun were properly admitted. Thus, even if petitioner were correct that his pre-warning statement about the gun should have been excluded, that error would be harmless beyond a reason-

able doubt. See Pet. App. 4a-5a; *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972).

2. Relying on the plurality opinion in *Missouri* v. *Seibert*, 542 U.S. 600 (2004), petitioner contends (Pet. 18-24) that the statements he made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed as the fruits of his initial pre-*Miranda* statements to Detective Bevington. The court of appeals correctly held that petitioner's post-*Miranda* statements were admissible. The police did not deliberately attempt to circumvent *Miranda*, and there was no evidence that the warnings were ineffective or that petitioner's statements were involuntary. Further review is not warranted.

a. In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court addressed the admissibility of a warned statement given by a suspect after the police had already obtained an unwarned statement from him in violation of *Miranda*. This Court held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314. The Court explained that a defendant's provision of incriminating statements before being administered the *Miranda* warnings does not, in the absence of "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," result in such a degree of psychological coercion that any subsequent administration of the warnings will be ineffective. *Id.* at 309, 313. The Court therefore concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement," an unwarned admission does not

give rise to any presumption that subsequent, warned statements were involuntary. *Id.* at 314.

In *Seibert*, the Court considered a police protocol for custodial interrogation whereby the police would deliberately delay giving *Miranda* warnings until after custodial interrogation had produced a confession, and then would lead the suspect to cover the same ground in a warned statement. 542 U.S. at 604 (plurality opinion). The plurality concluded that post-*Miranda* statements made in the context of successive unwarned and warned questioning are admissible only when "it would be reasonable to find that in th[e] circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* at 611. The plurality identified several facts present in the case that indicated that the *Miranda* warnings could not have functioned effectively: (1) the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill"; (2) the warned questioning followed the unwarned questioning by only 15-20 minutes; (3) the warned questioning took place in the same location as the unwarned questioning; (4) the same officer conducted both interrogations; and (5) the officer did nothing to dispel the defendant's probable misimpression that the warned interrogation was merely a continuation of the unwarned interrogation and that her unwarned inculpatory statements could be used against her. *Id.* at 616 (plurality opinion). The plurality reasoned that, in light of these factors, the *Miranda* warnings were ineffective, because "[i]t would have been reasonable [for the defendant] to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Id.* at 616-617 (plurality opinion).

Concurring in the judgment, Justice Kennedy provided the fifth vote for holding the post-warning statements to be inadmissible. Justice Kennedy stated that the plurality's objective test "cuts too broadly" because it would apply to both intentional and unintentional two-stage interrogations. *Seibert*, 542 U.S. at 621-622 (concurring). Instead, Justice Kennedy favored "a narrower test applicable only in the infrequent case * * * in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* at 622 (concurring). Absent a "deliberate two-step strategy," in Justice Kennedy's view, the admissibility of post-warning statements should be governed by *Elstad*. *Ibid.* (concurring). "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Ibid.*

b. Petitioner argues (Pet. 20-22) that this Court should grant review to clarify the holding of *Seibert* because, he asserts, there is widespread confusion in the lower courts as to how to determine whether post-warning statements are admissible when the defendant made prior unwarned statements. Petitioner is incorrect that review is warranted on that basis.

Every federal court of appeals that has decided the issue has concluded that Justice Kennedy's concurring opinion represents the holding of *Seibert*. See *United States* v. *Carter*, 489 F.3d 528, 535-536 (2d Cir. 2007), cert. denied, 128 S. Ct. 1066 (2008); *United States* v. *Street*, 472 F.3d 1298, 1313 (11th Cir. 2006), cert. denied, 551 U.S. 1138 (2007); *United States* v. *Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States* v. *Williams*, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); *United States*

v. *Kiam*, 432 F.3d 524, 532-533 (3d Cir.), cert. denied, 546 U.S. 1223 (2006); *United States* v. *Mashburn*, 406 F.3d 303, 308-309 (4th Cir. 2005); *United States* v. *Briones*, 390 F.3d 610, 613 (8th Cir. 2004), cert. denied, 545 U.S. 1122 (2005).[3] Petitioner cites (Pet. 22) only one decision—from the Georgia Supreme Court—that held that the plurality opinion represents the holding of *Seibert*. See *State* v. *Pye*, 653 S.E.2d 450, 453 n.6 (Ga. 2007).[4] That single outlying decision does not indicate that there is widespread confusion among the lower courts meriting this Court's review.

It may be true that the analysis in this context is not as straightforward as in some other contexts when multiple opinions compose a majority of the Court. In *Marks* v. *United States*, 430 U.S. 188, 193 (1977), this Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." See, *e.g.*, *Williams*, 435 F.3d at 1157-

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[3] Three courts of appeals have declined to decide the issue. See *United States* v. *Heron*, 564 F.3d 879, 884-885 (7th Cir. 2009) (declining to decide "what rule or rules governing two-step interrogations can be distilled from *Seibert*," while noting in dicta that "it [is] a strain at best to view [Justice Kennedy's] concurrence * * * as the narrowest ground on which a majority could agree"); *United States* v. *Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) (holding that statements should be suppressed under either standard); *United States* v. *Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir.) (holding that interrogation was constitutional under either standard), cert. denied, 549 U.S. 1065 (2006).

[4] Petitioner also relies (Pet. 21) on *State* v. *Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009), but there the court found it unnecessary to ascertain the holding of *Seibert* because it found that the statements should be suppressed under both the plurality's approach and Justice Kennedy's.

1158; *Mashburn*, 406 F.3d at 308-309. Justice Kennedy's opinion does provide a narrower ground for decision than the plurality, because his rule of exclusion applies only when "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," *Seibert*, 542 U.S. at 622, while the plurality's rule would require an objective inquiry into the effectiveness of the warnings in all cases where there are two successive interrogations, *id.* at 611.

In cases in which an impermissible intent is actually present, however, Justice Kennedy's opinion may provide a broader ground for exclusion, as Justice Kennedy would exclude a second related statement "unless curative measures are taken before the postwarning statement is made," *Seibert*, 542 U.S. at 622, while the plurality would permit the introduction of the second statement even in the absence of curative measures, so long as the *Miranda* warnings "could function 'effectively' as *Miranda* requires," *id.* at 611-612. Nevertheless, it is difficult to identify actual litigated fact patterns in which the police harbor a subjective intent to undermine *Miranda*, as Justice Kennedy would require, but where the second warned statement would be admissible under the plurality's "effective warnings" approach but not Justice Kennedy's "curative measures" approach. Accordingly any uncertainty about the application of *Marks* in this context does not warrant this Court's intervention. That is particularly true because it is rare that courts have found an impermissible intent under Justice Kennedy's opinion in the first place, and, absent such a finding, *Elstad* remains the controlling authority.

c. Even if this Court wished to review this issue, this case would not be an appropriate vehicle in which to do so, because petitioner's post-warning statements were

plainly admissible under both Justice Kennedy's approach and the *Seibert* plurality's approach.

Petitioner acknowledges that the evidence in this case would not satisfy Justice Kennedy's rule, as there is no indication that the police deliberately employed a two-step interrogation strategy in order to undermine the *Miranda* warnings. Pet. 22-23. Rather, Detective Bevington asked petitioner only three basic questions about the presence of other individuals, guns, or drugs in the apartment. After petitioner answered, Detective Bevington did not attempt to elicit any incriminating details, or even follow up at all. C.A. App. 38-40; Gov't C.A. Br. 19; Pet. 3-4. The detective then left petitioner alone for one to two hours before questioning was resumed. *Ibid.* The evidence thus demonstrates that the officers did not structure their questioning in a concerted attempt to undermine the *Miranda* warnings by eliciting a full confession before providing the warnings.

Petitioner's statements were also admissible under the *Seibert* plurality's approach. Detective Bevington did not exhaustively question petitioner during the initial interaction or seek to establish his commission of a criminal offense. Pet. App. 10a; C.A. App. 38-39. He did not ask any questions concerning drug trafficking or gun use, nor did he even attempt to determine the ownership of the gun or drugs. The brevity of the initial questioning "reduced the likelihood" that the *Miranda* warnings were not effective when given. *United States* v. *Carrizales-Toledo*, 454 F.3d 1142, 1152 (10th Cir.), cert. denied, 549 U.S. 1065 (2006). Moreover, because petitioner revealed nothing more during the first interaction than his knowledge of the presence of a gun and drugs in the apartment that he shared with another person, see Pet. App. 10a, it cannot plausibly be argued that peti-

tioner's detailed account of his drug trafficking activities during his second interaction was motivated by his perception that he already had irretrievably inculpated himself. Cf. *Seibert*, 542 U.S. at 616 (plurality opinion) (relying on the fact that "little, if anything, of incriminating potential [was] left unsaid" in the initial, unwarned questioning). Here, "[t]he differing content of [petitioner's] first and second [statements] * * * suggests that the initial interrogation did not undermine the *Miranda* warnings." *Carrizales-Toledo*, 454 F.3d at 1152.

The remaining *Seibert* factors also weigh heavily in favor of the admissibility of the post-warning statements. First, the two interactions occurred in different locations, the first during the drive to the police office and the second at the office. C.A. App. 64; Pet. App. 10a-11a; Pet. 3-4. Second, the two interactions were separated in time. Detective Bevington returned to petitioner's residence to participate in the execution of the search warrant after delivering petitioner to the office, and the second interaction did not begin until after his return an hour or two later. C.A. App. 40-41. Third, the post-warning interrogation was conducted by a different officer (albeit in Detective Bevington's presence). *Id.* at 42, 53-55, 64. And finally, there is no evidence that, in conducting the post-warning questioning, Detective Killingsworth referred back to the initial interaction or in any way suggested that the second round of questioning was a continuation of the first. *Id.* at 59. Accordingly, "[b]ecause the questioning was broken up into two distinct sessions, the midstream *Miranda* warnings were more likely to have had their intended effect." *Carrizales-Toledo*, 454 F.3d at 1152; cf. *Seibert*, 542 U.S. at 616 ("The impression that the further questioning was

a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.").

In sum, under either the plurality's approach in *Seibert* or Justice Kennedy's, the court of appeals correctly held that petitioner's post-warning statements were admissible. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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